

FEDERAL PUBLIC DEFENDER
CENTRAL DISTRICT OF CALIFORNIA
321 EAST 2nd STREET
LOS ANGELES, CALIFORNIA 90012-4202
213-894-2854
213-894-0081 FAX

CUAUHEMOC ORTEGA
Federal Public Defender
AMY M. KARLIN
Chief Deputy

ANGELA VIRAMONTES
Riverside Branch Chief
KELLEY MUNOZ
Santa Ana Branch Chief
K. ELIZABETH DAHLSTROM
Chief, Capital Habeas Unit

Direct Dial: (213) 894-5308

March 7, 2024

Molly C. Dwyer, Clerk of the Court
United States Court of Appeals for the Ninth Circuit

Re: Response to Government's Fed. R. App. P. 28(j) Letter on *United States v. Dubois*, --- F.4th ---, 2024 WL 927030 (11th Cir. Mar. 5, 2024), (Dkt. 66); *United States v. Duarte*, CA No. 22-50048 (Arg. & Sub.—December 4, 2023—Pasadena)

Dear Ms. Dwyer:

United States v. Dubois, --- F.4th ---, 2024 WL 927030 (11th Cir. Mar. 5, 2024), offers no new or persuasive analysis regarding § 922(g)(1)'s constitutionality. Contrary to *Bruen*, *Dubois* neither examines the Second Amendment's "plain text" nor identifies a relevant "historical tradition" of permanently dispossessing anyone convicted of any offense the legislature might choose to denominate a felony. See *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 17 (2022). (See also AOB 8-24.)

Instead, the Eleventh Circuit relies on a pre-*Bruen* case, *United States v. Rozier*, 598 F.3d 768 (11th Cir. 2010). See *Dubois*, 2024 WL 927030 at *3-*6. But *Rozier* also forgoes textual and historical analysis, instead leaning on the passage in *District of Columbia v. Heller*, 554 U.S. 570 (2008), describing "longstanding prohibitions on the possession of firearms by felons" as "presumptively lawful," and the references to "law-abiding" citizens. *Rozier*, 598 F.3d at 770-71; see also *Heller*, 554 U.S. at 626-27 & n.26.

Duarte's briefing explains why relying on that language and those references for a rule is contrary to *Bruen* and unworkable in practice. (AOB 27-30; ARB 7-

14.) *See also Range v. Att’y Gen.*, 69 F.4th 96, 99, 101-04, 106 (3d Cir. 2023) (en banc); *Atkinson v. Garland*, 70 F.4th 1018, 1022 (7th Cir. 2023). Notably, the government hasn’t been able to articulate, including at oral argument here, any meaningful limitation on such a rule that would prevent a motivated legislature from redefining common behavior as felonious in order to substantially restrict gun rights.

Nor does *Dubois*’s justification for its approach hold water. It reasons that since *Bruen* is faithful to *Heller*, any pre-*Bruen* precedent relying on language from *Heller* is still good law. *See Dubois*, 2024 WL 927030 at *5-*6. But *Bruen* held that courts had been misreading *Heller* to allow atextual and ahistorical limitations on the Second Amendment right. *Bruen*, 597 U.S. at 17. Thus, that *Bruen* is consistent with *Heller*’s core holdings can hardly mean that courts can cherry-pick language from *Heller* to sidestep *Bruen*’s pellucid holding that the only route to constitutionality is through text and history.

Sincerely,

/s/ Sonam Henderson

SONAM HENDERSON

Deputy Federal Public Defender

Certificate of Compliance re Length

Pursuant to Federal Rule of Appellate Procedure 28(j) and Circuit Rule 28-6, I hereby certify that the body of this letter (not including the letterhead, preliminary information, the greeting, and the signature block) contains 350 words.

/s/ Sonam Henderson

SONAM HENDERSON

Deputy Federal Public Defender